rity which applies the like doctrine to the power of the sovereign or commander-in-chief of the army and navy, or to other public functionary, authorized by the public law or statutory law, to issue or grant license to trade with the enemy in time of war. In respect to the authority granted to the public functionary to authorize such trade, the ordinary principles of construction are properly applicable. And when the authorized officer of the government has exercised the power, and the citizens of the government have largely acted under the authority, confiding in the validity of its exercise, no good reason is obvious, but on the contrary, much reason is manifest why the citizens so confiding shall not have illegality imputed to their transactions under it.

It is not to be doubted that trade authorized and conducted under the license of the President, so granted, and in conformity with the regulations of the Secretary of the Treasury, is not to be deemed illegal.

Decree affirmed.

Supreme Court of North Carolina.

KANE AND WIFE *v.* McCARTHY AND WIFE ET AL.

Any woman, being a free white person, and an alien friend, married after the approval of the Act of February 10th 1855, to a man who was, at the time of such marriage, a naturalized citizen of the United States, becomes, by such marriage, *ipso facto*, herself a citizen of the United States, and capable of inheriting real estate, although she resided in a foreign country at the time of her said marriage, and has continued her actual residence there ever since.

And any alien woman answering the above description, and married before the approval of the said act, to an alien husband, who has been subsequently naturalized, becomes by his naturalization, *ipso facto*, herself a citizen of the United States, and capable of inheriting real estate.

It is the status of being married to—being the wife of—a citizen, which makes the alien woman a citizen of the United States.

THIS was an action for the partition of certain real estate in the city of Raleigh.

The facts of the case were as follows: John Kane, who was a native of Ireland, but a naturalized citizen of the United States, resident in the city of Raleigh, being seised of certain real estate in said city, died intestate May 20th 1863. The decedent left no lineal descendants. At the date of his decease all his collateral

relations were aliens, who could not inherit according to the law of North Carolina, except the *femes coverts* and infants, parties to the suit, who all claimed to be citizens of the United States, and therefore capable of inheriting.

The plaintiff Martha Kane was a sister of John Kane, a free white woman, and a native of Ireland, where she had always resided until after the said John Kane's death, and she was never in the United States, until she came here in 1867 to institute this action; but on the 28th day of November 1857, being of full age, she married the plaintiff Thomas Kane, her cousin, who was, at the date of said marriage, a naturalized citizen of the United States, and had resided therein from 1848 to 1857, when he returned to Ireland, after having been lawfully naturalized in the state of New York in October 1855.

Both the plaintiffs, after their marriage, remained in Ireland until after John Kane's death, having, however, always the intention of eventually removing to the United States; and in 1867, the plaintiff Martha came to this country to institute this action, leaving her husband still in Ireland.

The defendant Mary McCarthy was also a sister of John Kane, a free white woman and a native of Ireland: she immigrated into the United States during her infancy, in the year 1850, and continued to reside therein ever after. In May 1851 she intermarried with the defendant Dennis McCarthy, an Irishman, who landed in the United States on the 12th of March 1850, and has resided here ever since, having been lawfully naturalized in the state of New Jersey in October 1856.

The infant defendants, Thomas Patrick McCarthy and Isabella McCarthy, were the children of Dennis and Mary McCarthy, were both born in the state of New Jersey, and have resided there ever since their birth; and, since 1865, these infants had been in the pernancy of the rents of the real estate described in the pleadings.

The plaintiffs filed their complaint in the Superior Court of Wake county, setting forth the above facts, claiming one-half of the real estate, in right of the plaintiff Martha, as one of the heirs of John Kane, admitting that the infant defendants were entitled to the other half, as the other heirs of the said John Kane, alleging further, that the said infant defendants claimed the whole of said real estate, and that the defendants Dennis and

Mary McCarthy, in right of said Mary, also set up an *unfounded* claim to the whole of the said real estate, and demanded judgment of partition and an account of the rents and profits.

The defendants demurred, "because it appears upon the face of the complaint, that the facts therein stated are not sufficient to constitute a cause of action, and to entitle the plaintiffs to the judgment which they demand."

The court gave judgment on the demurrer for the defendants, and thereupon the plaintiffs appealed to the Supreme Court.

Ed. Graham Haywood, for plaintiffs.—1st. By virtue of the 2d section of the Act of Congress of the 10th of February 1855, Martha Kane was, at the time of descent cast, a citizen of the United States, and capable of inheriting to her brother John.

It is admitted that Martha Kane is a woman who has married a naturalized citizen of the United States since the act, the only question is, was she, at the date of her marriage, "*a woman who might lawfully be naturalized under the existing laws.*" The auxiliary verb "*may*," in all its forms, has a *potential* meaning; it is used to express, not what *is*, but what *is possible;* and this expression, according to its natural interpretation, is equivalent to, any woman for whom, by the laws extant in 1855, naturalization was or is possible; in other words, any woman who, by the laws in force in 1855, was or is capable of becoming a citizen of the United States through the process of naturalization as then regulated by law.

2d. To ascertain who might lawfully be naturalized under the existing laws, we refer to the Naturalization Act of 1802, and find that "any alien being a free white person, provided that he or she is not an alien enemy," is capable of becoming a citizen of the United States by the process of naturalization: 10 Stats. at Large, ch. 71, p. 604; 1 Bright. Dig. of Laws, tit. *Citizenship*, p. 132, and tit. *Alien*, p. 73; 2 Kent's Com. (ed. of 1867, by G. F. Comstock), p. 15 n., and p. 36; 1 Scrib. on Dower, from p. 174 to p. 176, and pp. 144 and 147; 2 Am. Law Reg. (O. S.) p. 193; *Burton* v. *Burton*, 3 Am. Law Reg. (N. S.) p. 425; 26 How. Prac. Rep. p. 474; *Greer* v. *Sankston*, 26 How. Prac. Rep. p. 471; *Ludlam* v. *Ludlam*, 31 Barb. (N. Y.) p. 486; affirmed in the Court of Appeals, 26 N. Y. Rep.; also 3 Am. Law Reg. (N. S.) pp. 595 and 599.

3d. The Act of 1855 was not intended to provide a new process of naturalization for alien women and children, as is apparent from its title and whole purview and meaning; it was enacted to define and regulate the legal status as to citizenship of foreign-born wives and children of United States citizens, and to identify them in citizenship with the father and husband, without any process of naturalization. Its main object was to dispense with the process of naturalization in cases coming within its operation.

4th. To allow the words "who might lawfully be naturalized under the existing laws," the effect of compelling an alien woman to use the whole process of naturalization, except the final step of admission by a competent court of record, before she becomes a citizen by reason of the fact that she is the wife of a citizen of the United States, is to permit this single sentence to defeat the whole policy, purpose, and scope of the act.

W. H. Battle, for infant defendants.—By the laws of the United States, the following are indispensable requisites to naturalization. 1st. Five years' residence; 2d. Proof of good character; 3d. Renouncing title of nobility; 4th. Not being an alien enemy. Martha Kane was a native of Ireland and had always resided there; what was her character does not appear, the only requisite she had was that of being a white woman. Is that alone sufficient?

Residence here was a *sine qua non* to being naturalized. Act of 1802 required five years' residence, proof of good moral character, and attachment to the Constitution. Act of March 1813 required five years' residence. Act of March 1816 required the same. Act of May 1824 required five years' residence even for minors. Act of 1828 required five years' continued residence and particular proof of it. Act of 1848 only strikes out the clause, "without being at any time within the said five years out of the territory of the United States," which was in the Act of 1813, still leaving a five years' residence to be necessary. It will thus be seen that all the acts insist upon residence as an indispensable requisite to naturalization, without repeating the clause which requires proof of character.

An alien *feme covert* may be naturalized: see *Ex parte Pic*, 1 Cranch, Cir. Co. Rep. 372; and she must be naturalized before she can claim dower: see 1 Cruise Dig., tit. *Dower*, chap.

1, sect. 29 and 30; Smith on Real and Per. Property, p. 296; *Paul* v. *Ward*, 4 Dev. 247.

Compare our act with the 7 & 8 Vict. ch. 66, sect. 16, and it will be seen that ours is a copy of it, with the additional words, "who might lawfully be naturalized under the existing laws." The British statute reads thus: "Any woman, married, or who shall be married to a natural born subject, or person naturalized, shall be deemed and taken to be herself naturalized, and have all the rights and privileges of a natural born subject:" see *Regina* v. *Manning*, 66 Eng. Com. Law Rep. p. 886.

S. F. Phillips and *R. H. Battle, Jr.*, for the adult defendants.—In 1863, at the death of John Kane, Mary McCarthy his sister, being a person who, under existing laws, *might be naturalized*, and being the wife of a citizen of the United States, was herself a citizen, and so is an heir of John Kane.

If she be an heir, she is so to the exclusion of her children, the defendants Francis P. and Isabella McCarthy.

In 1863, at John Kane's death, his sister Martha Kane, though the wife of a citizen of the United States, was not a woman who *might be naturalized*, and could not be John Kane's heir.

The words "*who might be naturalized*" mean one *who is in a condition to be naturalized* under existing laws, and the intent of the act must have been to dispense with the usual forms attending the process of naturalization in case of marriage to a citizen. In such case, omission by the wife to go through the *forms* of naturalization (and *naturalization* of a woman by the courts is of rare occurrence) is cured by her being married to a citizen. That the woman should be a resident, and subject to the jurisdiction of the courts of the United States, must be required.

As to the question of *residence*, the policy of the legislation of the United States, is apparent by reference to the words of Mr. Webster's bill of 1848, in which the words "and shall *continue to reside* therein," show that residence in the country was presumed as a necessity of citizenship.

Who might be naturalized, cannot be a periphrasis for *free white woman*. Reference is made in the 1st section of the act to the Act of 1802, in which the expression *free white person* is used six times.

The Act of 1802 was before the draftsman, and there was no

reason for the abandonment of an expression of certain meaning for one intended to be synonymous but of doubtful import. *Who might be* was used deliberately, and does not mean *who may be.*

Burton v. *Burton* is an authority against the plaintiff, though the reasons given for the decision were not well considered, and the *dicta* are bad as well as gratuitous.

As to the effect of change of words in statutes, see Dwarris on Statutes, p. 707.

The opinion of the court was delivered by

PEARSON, C. J.—The right of the feme plaintiff, Martha Kane, to take by descent, as one of the heirs at law of John Kane, depends upon the construction of the 2d section of the Act of February 10th 1855.

The wording of this section is very precise, and, as it seems to us, its meaning is too clear to leave much room for construction, or to call for much discussion.

What description of woman might lawfully be naturalized, under the existing laws? That depends on the Act of 1802: "Any alien, being a free white person, may be admitted to become a citizen of the United States on the following conditions, and not otherwise:" sec. 1. And there is a proviso that the person must not be an alien enemy. Martha Kane is a free white woman, a native of Ireland, and was not an alien enemy, therefore she might lawfully have been naturalized under the existing laws, and answers the description required by the section under consideration; she was married to a citizen of the United States when the descent was cast, and was then herself a citizen, by force of the Act of 1855, and takes as one of the heirs of her brother.

But it is said that Martha Kane had no residence in the United States before or at the time of the descent cast. That is true; and it might be added that she never filed a declaration of intention, never took an oath to support the Constitution of the United States, or renounced her allegiance to the Queen of Great Britain; and there was no proof of her being a woman of good moral character, attached to the principles of the Constitution of the United States.

The reply is,—these are conditions which persons applying for naturalization *under the Act of* 1802, are required to comply with.

But there are no such conditions imposed by the Act of 1855; it only requires that the woman shall be one of such a description as might be lawfully naturalized under the existing laws, and if she answers the description, the very object of the act was to dispense with all these requirements, and make her a citizen by the mere fact of her being married to a citizen of the United States. In other words, the wife of every citizen of the United States "is to be deemed and taken to be a citizen," so that if a citizen marries an alien woman residing here, *ipso facto* she is a citizen also, without going through the forms required by the Act of 1802; or, if he marries an alien woman residing in Ireland, *ipso facto* she is a citizen, and should he die without returning to the United States, she will take dower; or, if he settles his land on her by will or otherwise, she will take and hold. The policy of the Act of 1855 is to identify the wife with the husband in regard to *citizenship*, and thus to carry out the principles of the common law as to the relation of "husband and wife."

Does the conclusion need confirmation? It is furnished by the 1st section; the *status* of the father is made that of the child, and on its birth, *ipso facto*, it is a citizen of the United States, without residence, declaration of intention, or oath to support the Constitution, all being dispensed with, and the only limitation is, that if the child never comes to reside in the United States, the right of citizenship shall not descend to his children.

And this section puts a limitation upon the descent of citizenship to the children of a wife who never comes to reside in the United States; so if her citizen husband dies, and she marries an alien, her child by the second husband would not be a citizen, for it is confined to children whose *fathers* are citizens.

On the argument, our attention was called to 7 & 8 Vict.: "Any woman, married or who shall be married to a natural born subject or person naturalized, shall be deemed and taken to be herself naturalized, and have all the rights and privileges of a natural-born subject." It is clear that the Act of 1855 was taken from this statute, and it is then asked, why change the wording, and, instead of "any woman," use the paraphrase "any woman who might lawfully be naturalized under the existing laws," if the operation of the act was to be as broad and sweeping as that of Victoria?

It is not seen how this can have much effect upon the argu-

ment, but the solution is easy. The Act of 1802 does not make *any woman* capable of being naturalized, so it was necessary to make some change by adding the words "free *white* woman," or some equivalent expression, and the history of parties in 1855 fully explains why this equivalent expression was adopted, instead of "free *white* woman;" for at that time an angry contest was going on in reference to the words "all men are born free and equal," and a formidable party took the ground that the Act of 1802 was in violation of the Declaration of Independence, in so far as it attempted to exclude from citizenship all who were not "free *white* persons." If the words "free white" had been left out, the bill would have met with opposition from the South, and if these words had been expressed, it would have met with opposition from the North, so the reason for adopting an expression which leaves that question open is obvious.

Having settled the right of Martha, the right of her sister Mary can be settled in few words.

Mary was a resident of the United States at the time of her marriage; in this, seemingly, she has the advantage of Martha; but her husband was not a citizen of the United States at the time of her marriage; in this, seemingly, Martha has the advantage of her, but in fact they both stand on the same footing, for it is not the ceremony of marriage, or its time or place, but it is the fact of being "married to," that is, being the wife of a citizen, that makes the woman a citizen. The circumstance that her husband was not a citizen at the time of the marriage is wholly immaterial, for he became a citizen afterwards; *ipso facto* she being a free white woman married to a citizen, comes within the description and the very words of the Act of Congress, and is deemed and taken to be a citizen; for it is the *status* of being married to—being the wife of a citizen, that makes her one.

It can in no possible view make any difference whether the marriage ceremony is performed first and then the husband becomes a citizen, or whether he becomes a citizen first, and the marriage afterwards takes place. Wherever the two events concur and come together, she is a woman married to a citizen.

The thing seems to us too plain to admit of discussion—it is like trying to prove that two added to two make four.

Mary is entitled to the other moiety, and the defendants, her two children, are excluded.

There is error, judgment reversed and judgment that plaintiff recover one undivided moiety of the lands mentioned in the pleadings, and that partition be made between the plaintiff Martha and the defendant Mary.

To this end, it is referred to the clerk to inquire whether a sale will be necessary for the purpose of partition; and an account will be taken of the rents and profits; the plaintiff will have judgment for costs.

Burton v. *Burton*, 26 Howard's Practice Rep. 474; *Ludlam* v. *Ludlam*, 31 Barb. 487, cited on the argument, received due consideration by the court.

Since the foregoing case was decided the Supreme Court of the United States, in *Kelly* v. *Owen*, have construed the same Act of Congress. We have not seen the full opinion (which will be published in 7 Wallace); but, judging from the syllabus, furnished us by the Reporter (ante, p. 444), the court seems to take the same view of the act as the court in the foregoing case.

J. T. M.

Supreme Court of Alabama.

J. DUBOSE BIBB *v.* EVELYN POPE.

The husband and wife cannot enter into a mortgage of her statutory separate estate for the purpose of subjecting it to sale for the payment of the husband's debts; and if they do, a court of chancery will not permit the mortgage to be enforced by sale of the wife's separate estate, if she objects to it.

THE opinion of the court was delivered by

PETERS, J.—On the 5th of April 1866, Augustus Pope, the husband of Mrs. Evelyn Pope, appellee, borrowed of J. Dubose Bibb, appellant, the sum of $10,000, for which he gave his bill of exchange for $12,400, payable eight months after date, to order of said Bibb. On the same day said Augustus Pope executed and delivered to said Bibb a certain conveyance in writing, in the form of a mortgage, whereby he conveyed to Bibb certain lands therein named, which belonged to himself, and a lot numbered 57 in the city of Montgomery in this state, which was the separate property of his wife, said Evelyn Pope. This mortgage contained a power to sell the land contained therein, in the event that Pope failed to pay said bill of exchange at its maturity. Mrs. Pope united with her husband in this mortgage, and the same is attested by two